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IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GOMEZ,

Defendant and Appellant.

B268613

(Los Angeles County  
Super. Ct. No.  
BA423344)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shelly Torrealba, Judge. Affirmed as modified.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Michael R. Johnsen,  
Supervising Deputy Attorney General, Lindsay Boyd,  
Deputy Attorney General, for Plaintiff and Respondent.

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The jury found defendant and appellant Jose Gomez guilty in count 1 of possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1), and in count 3 of carrying a loaded firearm in a vehicle (Pen. Code, § 25850).<sup>1</sup> Defendant admitted allegations as to counts 1 and 3 that he was on bail in Los Angeles Superior Court Case No. BA410042 at the time of the offenses.<sup>2</sup> (§ 12022.1.)

The trial court sentenced defendant to 4 years in prison in count 1, but suspended execution of sentence and placed defendant on probation for 3 years with the condition that he spend 155 days in county jail. Relevant here, the court also imposed conditions of probation relating to controlled substances and deadly and dangerous weapons. The court stayed the sentence in count 3 pursuant to section 654.

Defendant contends that the conditions of his probation are unconstitutionally overbroad. He also

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<sup>1</sup> All statutory references are to the Penal Code, unless otherwise indicated.

<sup>2</sup> Count 2 charged the passenger of the vehicle that defendant was driving with carrying a loaded unregistered handgun.

requests independent review of the sealed portion of the record pertaining to discovery of personnel records of two officers under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) to determine whether the trial court erroneously withheld discoverable information from the defense.

The Attorney General contests that the probation conditions are overbroad, but does not oppose review of the record pertaining to defendant's *Pitchess* motion.

Our review of the record disclosed that the minute order dated November 2, 2015, did not conform to the oral pronouncement of judgment with respect to a condition of probation. We conclude that the minute order must be corrected to reflect the trial court's oral pronouncement.<sup>3</sup>

We modify the challenged conditions of probation, and order the minute order corrected to reflect the trial court's oral pronouncement of judgment, but otherwise affirm.

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<sup>3</sup> We invited the parties to submit supplemental briefing on the matter, but neither party did so.

## DISCUSSION<sup>4</sup>

### *Overbroad Probation Conditions*<sup>5</sup>

At the sentencing hearing held on November 2, 2015, the trial court imposed several conditions of probation, including that defendant “stay away from places where [drug] users or sellers congregate” and “not remain in any vehicle or location where any dangerous or deadly weapon is possessed nor remain in the presence of any unlawfully armed person.”

Defendant challenges these probation conditions as unconstitutionally overbroad because they do not require him to have knowledge that: he is in a location where drug users and buyers are congregating; he is in a location or vehicle where dangerous or deadly weapons are possessed; or

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<sup>4</sup> We do not discuss the facts underlying defendant’s conviction because they are not relevant to the issues raised on appeal.

<sup>5</sup> Defendant did not object to the conditions of his probation at sentencing, but, as the Attorney General concedes, because he challenges the probation conditions as unconstitutionally overbroad on their face, the issue presents a “pure question[ ] of law that can be resolved without reference to the particular sentencing record developed in the trial court [and may be reviewed on appeal].” [Citation.]’ [Citation.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

he is in a location where persons are unlawfully armed. He requests that we strike the conditions and remand for the trial court to reimpose them with the proper knowledge requirements included. The Attorney General argues that the knowledge requirements are implicit, making remand unnecessary. If we determine that the knowledge requirements must be express, the Attorney General urges this court modify them rather than remanding the matter to the trial court to do so.

“[C]ourts possess broad discretion in determining suitability for probation and the selection of probation conditions. (Pen. Code, § 1203, subd. (b); *People v. Welch* (1993) 5 Cal.4th 228, 233.) ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .” [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if the conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.’ (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted.)” (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641 (*Harrison*).)

“A probation condition is constitutionally overbroad when it substantially limits a person’s rights and those limitations are not closely tailored to the purpose of the condition.” (*Harrison, supra*, 134 Cal.App.4th at p. 641.)

Conditions that prohibit a probationer from associating with categories of people or remain in certain places impinge on the constitutional right to freedom of association and must be narrowly drawn. (*People v. Garcia* (1993) 19 Cal.App.4th 97, 101–102 (*Garcia*).)

The parties agree that probation conditions are constitutionally overbroad “when they do not require the probationer to have knowledge of the prohibited conduct or circumstances.” (*People v. Kim* (2011) 193 Cal.App.4th 836, 843; see also *People v. Patel* (2011) 196 Cal.App.4th 956, 960 (*Patel*) [“a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter”].) The parties disagree only as to whether the knowledge requirement must be explicit or is implied.

This has been an issue for debate among the Courts of Appeal. The Fifth Appellate District has held that omission of an express knowledge requirement renders a probation condition prohibiting association with drug users and felons constitutionally overbroad, and consequently modified the probation condition to include the requirement. (*Garcia, supra*, 19 Cal.App.4th at p. 102.) In contrast, the Third Appellate District held that the knowledge requirement is implicit because “a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter.” (*Patel, supra*, 196 Cal.App.4th at p. 960.) It also modified the probation condition before it to include a knowledge requirement, but stated unequivocally that it would not modify similar probation conditions in the future.

(*Id.* at pp. 960–961.) Division Three of the Fourth Appellate District agreed with the Third Appellate District that a knowledge requirement is implied in probation conditions, and also chose to modify the challenged conditions before it nonetheless. (*People v. Moses* (2011) 199 Cal.App.4th 374, 381.) Whether a no-contact probation condition must be “modified to explicitly include a knowledge requirement” is an issue currently pending before the California Supreme Court. (*In re A.S.* (2014) 227 Cal.App.4th 400, review granted Sept. 24, 2014, S220280.) Pending guidance on this issue, we conclude that the prudent course is to modify the probation conditions at issue to make the knowledge requirements explicit.

### ***Inaccurate Minute Order***

At the November 2, 2015 sentencing hearing the trial court also orally imposed the following condition of probation: “Do not associate with persons known by you to be controlled substance users or sellers except in an authorized drug treatment program.” The minute order incorrectly states: “Do not associate with drug users or sellers unless attending a drug treatment program.” When there is a discrepancy between the court’s oral pronouncement at sentencing and the minute order, the court’s oral pronouncement controls. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1183.) We order that the November 2, 2015 minute order be corrected to properly

reflect the oral pronouncement.

### ***Pitchess Motion***

The court conducted an in camera hearing based on defendant's *Pitchess* motion requesting material from the personnel files of two officers concerning complaints of misconduct relating to the officers' honesty and integrity, including accusations of lying; filing false reports; fabricating admissions, confessions, or other evidence; perjury; theft; fraud; misrepresentation; illegal cover-ups; or malfeasance. The motion was based on counsel's declaration that the officers lied regarding the basis for their search of defendant's vehicle, how the search was conducted, whether defendant claimed ownership of all items in the vehicle, and whether the contraband items were present in the vehicle prior to the search.

After conducting the in camera review of the documents presented by the custodian of records, the trial court found no discoverable material to be turned over to the defense. Defendant, who is not privy to the sealed transcript of the in camera hearing, requests that this court conduct an independent review of the sealed portion of the record. Pursuant to that request, we must determine whether the trial court abused its discretion and erroneously denied access to discoverable information from the defense.

A criminal defendant is entitled to discovery of officer personnel records if the information contained in the records



is relevant to his ability to defend against the charge. (*Pitchess*, *supra*, 11 Cal.3d at pp. 536–537.) Later enacted legislation implementing the court’s rule permitting discovery (§§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043–1047) balanced the accused’s need for disclosure of relevant information against a law enforcement officer’s legitimate expectation of privacy in his or her personnel records. A defendant, by written motion, may obtain information contained in a peace officer’s personnel records if it is material to the facts of the case. (Evid. Code, § 1043, subd. (b)(3).) The trial court rules whether there is good cause for disclosure of the officer’s personnel records. (Evid. Code, §§ 1043, 1045.) If the court orders disclosure, the custodian of the officer’s records brings to court all the potentially relevant personnel records, and, in camera, the trial court determines whether any part of the record is to be disclosed to the defense. “A trial court’s ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion.” (*People v. Hughes* (2002) 27 Cal.4th 287, 330; see also *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Gill* (1997) 60 Cal.App.4th 743, 749.)

We ordered the trial court to provide us with the sealed documents it reviewed in conducting its *Pitchess* analysis. Having obtained those documents, we have reviewed them, along with the sealed transcript of the in camera hearing. “The hearing transcript contains an adequate record of the

court's review and analysis of the documents provided to it. It reveals no abuse of discretion." (*People v. Myers* (2007) 148 Cal.App.4th 546, 553, citing *People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

## **DISPOSITION**

We order the minute order of the November 2, 2015 sentencing hearing to be modified as follows:

(1) The first sentence of the controlled substances condition is modified to read: "Do not knowingly use, own, possess, buy, or sell any controlled substances or associated paraphernalia except with a valid prescription and stay away from places where you know drug users or sellers congregate."

(2) The second sentence of the controlled substances condition is modified to read: "Do not associate with persons known by you to be controlled substance users or sellers except in an authorized drug treatment program."

(3) The dangerous and deadly weapons condition is modified to read: "Do not remain in any vehicle or location where you know that any dangerous or deadly weapon is possessed or remain in the presence of any person known to you to be unlawfully armed."

In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J.

KIN, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.